Filed 8/25/04 In re Rogelio M. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ROGELIO M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ROGELIO M., Defendant and Appellant.	F044710 (Super. Ct. No. JW102284-00) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. H. A. Staley, Judge.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Stan Cross and Daniel Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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The court adjudged appellant, Rogelio M., a ward of the court (Welf. & Inst. Code, § 602) after Rogelio admitted he possessed cocaine (Health & Saf. Code, § 11350, subd. (a) (count 1)) and less than an ounce of marijuana (Health & Saf. Code, § 11357,

subd. (b) (count 2)). Although Rogelio was statutorily eligible for a Proposition 21 deferred entry of judgment (DEJ), the probation department considered him not suitable and recommended DEJ be denied. (Welf. & Inst. Code, § 790 et seq., added by initiative, eff. Mar. 8, 2000 (Prop. 21, § 29).)[1] The court followed the probation department's recommendation, denied DEJ, found count 1 to be a felony, and placed Rogelio on probation for a period not to exceed his 21st birthday.

On appeal, Rogelio contends the court abused its discretion when it denied DEJ, and if not, erred in not giving him an opportunity to withdraw his admissions. As we shall explain, we will find no abuse of discretion in denying DEJ, but will remand the case to the juvenile court to give Rogelio an opportunity to withdraw his admissions.

FACTS

We summarize the facts from the probation report. Shortly before 5:00 p.m. on October 26, 2003, a Bakersfield Police Department patrol officer stopped a car for having darkly tinted front windows. Rogelio, then 16 years old, was a passenger in the car being driven by his 23-year-old cousin, Fernando. The officer saw Rogelio and Fernando make movements toward the car's center console and detected an odor of marijuana from inside the car. A search of the car revealed marijuana and a substance the officer suspected to be methamphetamine, but which later tested positive as cocaine.

Fernando admitted he possessed the marijuana, but denied knowing about the other substance. Rogelio initially said he had no idea about the drugs. Fernando was then overheard telling Rogelio to take the blame for the suspected methamphetamine because he was a juvenile; after that, Rogelio spontaneously stated the "crank" was his. Rogelio later told the probation officer Fernando gave him the drugs to hide in the car.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

He also said: "My cousin didn't tell me to say it was my drugs. It was my crank. I was going to use it. I came to the United States to look for work. I didn't find work."

DISCUSSION

I. Denial of DEJ

Rogelio contends his status as an illegal alien was a decisive factor in the juvenile court's refusal to grant him DEJ. Rogelio argues denial of DEJ was an abuse of discretion and deprived him of equal protection of the laws in violation of both the state and federal constitutions. Neither contention has merit.

A. Determining Eligibility and Suitability for DEJ

The DEJ provisions of section 790 et seq. were enacted as part of Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558 (*Martha C.*).) "The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed." (*Ibid.,* citing §§ 791, subd. (a)(3), 793, subd. (c).)

A court may grant DEJ if a minor is both eligible and suitable. (*Martha C., supra,* 108 Cal.App.4th at p. 562.) A minor is eligible for DEJ under section 790 if all of the following circumstances apply: "(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense. [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707. [¶] (3) The minor has not previously been committed to the custody of the Youth Authority. [¶] (4) The minor's record does not indicate that probation has ever been revoked without being

completed. [¶] (5) The minor is at least 14 years of age at the time of the hearing. [¶] (6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code." (§ 790, subd. (a)(1)-(6).)

Here, there was no dispute regarding Rogelio's eligibility for DEJ. Once eligibility is established, "the statutory language empowers but does not compel the juvenile court to grant" DEJ. (*In re Sergio R.* (2003) 106 Cal.App.4th 597, 605.) The court must make an independent determination of the minor's suitability after consideration of the factors specified in California Rules of Court, rule 1495(d)(3) and section 791, subdivision (b), "'with the exercise of discretion based upon the standard of whether the minor will derive benefit from "education, treatment, and rehabilitation" rather than a more restrictive commitment. [Citations.]'" (*Martha C., supra,* 108 Cal.App.4th at p. 562, italics omitted.) These "suitability" factors include the minor's age, maturity, educational background, family relationships, motivation, any treatment history, and any other relevant factors regarding the benefit the minor would derive from education, treatment, and rehabilitation efforts. (Cal. Rules of Court, rule 1495(d)(3); see also § 791, subd. (b).)[2] A court may find the circumstances of a crime indicate that a minor is not amenable to rehabilitation. (*Martha C.,* at p. 562.) We review a court's denial of DEJ for abuse of discretion. (*In re Sergio R.,* at p. 607 .)

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[2] California Rules of Court, rule 1495(d)(3) reiterates and expands the suitability factors in section 791, subdivision (b). In particular, rule 1495(d)(3)(A) provides that "[t]he Probation report shall address the following: [¶] (i) The child's age, maturity, educational background, family relationships, motivation, any treatment history, and any other relevant factors regarding the benefit the child would derive from education, treatment, and rehabilitation efforts; and [¶] (ii) The programs best suited to assist the child and the child's family."

B. Juvenile Court Proceedings

After Rogelio admitted he possessed the cocaine and marijuana, the juvenile court referred the matter to the probation department to assess Rogelio's suitability for the DEJ program. In considering whether Rogelio would benefit by education, treatment, or rehabilitation, the probation officer reviewed the suitability factors and reached the following conclusions: (1) Rogelio is 16 years old and "although he appears to be of normal maturity, he does not appear to understand the seriousness of his behavior"; (2) Rogelio last attended school in Mexico and had not been enrolled in school in over a year; (3) Rogelio "lacks appropriate supervision and is negatively influenced by the adult role models in the home" as shown by the facts that Rogelio's mother lives in Mexico, his father is deceased, Rogelio was living with his adult brother and his brother's wife, Rogelio shared a room with Fernando, who was involved in the offense, and Rogelio's sister-in-law lent Fernando her car, knowing Fernando did not have a driver's license; (4) Rogelio "does not appear motivated to change his behavior and is unconcerned he has violated the laws pertaining to illegal drug use and possession"; (5) Rogelio has not received any services as he is an illegal alien who has only been in the United States since January 2003; and (6) "the offense appears to be aggravated as [Rogelio] admits the drugs found in the vehicle were his and he obtained them for his use[,]" Fernando was driving the car without a valid driver's license and was also in possession of drugs, and Rogelio is an illegal alien whose mother lives in Mexico.

Based on this information, the probation officer concluded that although Rogelio was eligible for DEJ, he was not a suitable candidate. The probation officer summarized this conclusion as follows: "The minor does not have a legal guardian in this country and the family members with whom he was residing do not appear able to provide adequate supervision and guidance for the minor to receive rehabilitation within the community. It is not felt the minor would benefit from the community resources available through the [DEJ] Program based on his illegal status and family situation." Accordingly, the

probation officer recommended Rogelio be given probation, explaining: "It is recommended [Rogelio] be adjudged a Ward of the Court and detained in Juvenile Hall pending release to the Immigration and Naturalization Service. The Immigration and Naturalization Service was contacted and made aware of this situation. They reported they would deport the minor based on his status, family situation, and illegal behavior. It will be recommended the minor be given probation terms in case he returns to this country."

At the contested dispositional hearing, Rogelio's counsel objected to the probation officer's recommendation. After the court stated it had read the probation officer's report and asked Rogelio's counsel if there was anything further, the following exchange occurred:

"[ROGELIO'S ATTORNEY]: Yes, your Honor. I would just raise our objection that originally he was given the opportunity of deferred entry of judgment. We accepted it. And although there is a listing of the five criteria, clearly the reason he is not being given deferred entry of judgment is that he is not a citizen. And I would argue that the deferred entry of judgment should be available for aliens as well as citizens. No further statement.

"THE COURT: In general, I agree with you, but in order for him to perform satisfactorily in a program that would be designed for the deferred entry of judgment, it would appear his presence would be at the – presence for the services would be a requirement. I don't see how we can accomplish that.

"[ROGELIO'S ATTORNEY]: That was my hope, to avoid deportation through the deferred entry.

"THE COURT: Objection will be noted for the record.…"

The court then found count 1 a felony, adjudged Rogelio a ward of the juvenile court and granted probation not to exceed his 21st birthday. The court ordered Rogelio to remain in juvenile hall pending release to the Immigration and Naturalization Service

(INS), and to report to the probation officer within 48 hours of his re-entry into the United States.[3] With respect to DEJ suitability, the court stated: "I have read and considered the criteria in the analysis regarding his suitability for the deferred entry of judgment program and for the reasons contained in the report will find that he is not a suitable candidate for the deferred entry of judgment. In large part, just so it's clear, because it appears he is going to be deported and would be unable to participate in the deferred entry of judgment plan."

C. Analysis

Rogelio contends the juvenile court abused its discretion when it denied him DEJ because he is an illegal alien. In cases involving adults, trial courts "are free to consider illegal alien status as a factor in determining whether a defendant is a good candidate for the deferred judgment program, but illegal alien status is not an automatic disqualification." (*People v. Cisneros* (2000) 84 Cal.App.4th 352, 357 (*Cisneros*); see also *People v. Espinoza* (2003) 107 Cal.App.4th 1069, 1076 [trial court may properly exercise discretion to deny probation under Proposition 36 "where the defendant faces a substantial likelihood of imminent deportation"]; *People v. Sanchez* (1987) 190 Cal.App.3d 224, 231 [in determining whether to grant probation, trial court may properly consider illegal alien status "with all other relevant factors in exercising its discretion"].) A trial court errs when it categorically excludes illegal aliens from participation in a deferred judgment program for first time drug offenders. (*Cisneros*, *supra*, 84 Cal.App.4th at p. 357.) Thus, in *Cisneros*, the Court of Appeal held the trial

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[3] At the detention hearing, the probation department recommended Rogelio be detained because of the condition of Rogelio's brother's home, which the probation officer said was "rather unacceptable[,]" as well as the lack of a legal guardian. According to the probation officer, the house was "extremely filthy" and therefore "unsafe for the minor." Based on this information, the court ordered Rogelio placed in the care of the probation department pending disposition of the case.

court erred when it denied admission to the deferred entry of judgment program on the ground the defendant could not satisfy the program requirement of obeying all laws, since his status as an illegal, unregistered alien, necessarily meant he was violating the law which requires him to register. (*Id.* at p. 355.)[4]

Relying on *Cisneros*, Rogelio contends the juvenile court improperly denied him DEJ solely because he is an illegal alien in danger of deportation. This premise, however, is wrong. As set forth above, the court stated very clearly it was exercising its discretion to deny DEJ for the reasons stated in the probation report, only one of which was the fact that he was in danger of deportation. These other reasons, as set forth in the probation report, included Rogelio's failure to understand the seriousness of his behavior; not being enrolled in school; the lack of appropriate supervision in his brother's home and the negative influence of the adults living there; Rogelio's lack of motivation to change his behavior and lack of concern that he had violated the law; and his lack of a legal guardian in this country. These factors had absolutely nothing to do with his status as an illegal alien. While Rogelio focuses almost entirely on the court's statement that Rogelio was not suitable for DEJ "[i]n large part … because it appears he is going to be deported[,]" in arguing that the court relied solely on the prospect of deportation in denying DEJ, the fact that the court used that phrase does not transform its ruling into one based entirely on that factor, especially given its reference to the other factors contained in the probation report.

By comparison, in *People v. Sanchez*, this court affirmed not one but two denials of probation where, in both instances, the *first of only two* reasons the trial court cited was immigration status. As this court stated: "Considering the record before us as to each appellant, it is clear the illegal alien status of Mr. Castillo and Mr. Sanchez was but

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4 Although all of these cases involved adult probation or diversion programs and not the juvenile DEJ program, the parties do not dispute that these principles apply equally to the DEJ statutes at issue here. Likewise we assume, without deciding, that they do.

one of several factors weighed and considered by the trial courts in denying probation." (*People v. Sanchez*, *supra*, 190 Cal.App.3d at p. 232, fn. omitted.) And in *Cisneros*, the Court of Appeal reversed the trial court's denial of a convicted drug-case defendant's admission into a deferred entry of judgment program because it was unmistakable from the record that the *only reason* for the trial court's ruling was the defendant's illegal alien status. (*Cisneros*, *supra*, 84 Cal.App.4th at p. 357.) In contrast, in the present case the prospect of deportation was but one of several factors the juvenile court weighed and considered in denying Rogelio DEJ.

Rogelio contends the court's finding that he was in danger of deportation was without foundation because the court could only speculate either that he would be deported or that he would not be able to complete the DEJ program before he was deported. As this court has stated, however, "[w]hen dealing with an illegal or undocumented alien, the trial judge must assume, barring presentation of cognizable and credible evidence to the contrary, a defendant will be deported … upon his release from custody when no period of incarceration is imposed. This is particularly true where a defendant is convicted of possession or sale of a controlled substance." (*People v. Sanchez*, *supra*, 190 Cal.App.3d at p. 230.)

More recently, the First District Court of Appeal held that a trial court is free to exercise its discretion to deny probation "where the defendant faces a substantial likelihood of imminent deportation, such that his probation cannot effectively be conditioned on completion of a drug treatment program[.]" (*People v. Espinoza*, *supra*, 107 Cal.App.4th at p. 1076; see also *Cisneros*, *supra*, 84 Cal.App.4th at p. 358 [in which the court noted that an illegal alien may be a poor candidate for deferred entry of judgment because of "typically limited ties to the community and the prospect of deportation."]) In rejecting the defendant's argument that he might not be deported, the court in *Espinoza* noted: "It is not unreasonable for the trial court to assume that the INS will act to deport defendant in furtherance of its federal statutory duties. (See Evid.

Code, § 664 [presumption that official duties are regularly performed].) In fact, it is California public policy to *facilitate* deportation of undocumented aliens who commit drug offenses in this state. Penal Code section 5025 establishes procedures to identify and transfer custody of undocumented aliens incarcerated in California to the INS. Uncodified legislative findings accompanying the adoption of section 5025 emphasized that one of its overriding purposes was to focus INS deportation efforts in California on undocumented aliens involved in drug-related crimes, in part to alleviate the burden of these crimes on our communities and courts. [Citation.] Health and Safety Code section 11369 mandates notice to the INS whenever there is reason to believe that a person arrested for certain drug offenses in California, including simple possession, may not be a citizen of the United States." (*People v. Espinoza*, *supra*, 107 Cal.App.4th at p. 1075, fn. 5.)

In the present case, all evidence pointed to the conclusion that Rogelio would be immediately deported. The INS was informed of Rogelio's situation and told the probation officer Rogelio would be deported based on his status, family situation and illegal behavior. The INS was also apparently prepared to take custody of Rogelio once he was released from juvenile hall. No evidence was presented that Rogelio would not be immediately deported. Even Rogelio's attorney recognized deportation was likely, as evidenced by his statement that he hoped to avoid deportation through DEJ. Based on the evidence presented at the hearing, the court did not abuse its discretion in concluding that Rogelio faced a substantial likelihood of imminent deportation.[5]

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[5] Rogelio argues if the court can deny DEJ based on the "mere possibility" of deportation, all illegal aliens would be categorically ineligibile for DEJ, since all illegal aliens face the prospect of deportation. We might agree with Rogelio if there were no evidence in this case that deportation was more than a mere possibility. The evidence presented here, however, amply supports the conclusion that Rogelio faced a substantial likelihood of imminent deportation based on his criminal behavior and family situation. For this reason, the United States Supreme Court case Rogelio relies on for the principle that courts should not speculate about whether a child will be deported, *Plyler v. Doe*

For the same reasons, nothing in the juvenile court's denial of DEJ offends the constitutional guarantee of equal protection. As this court held in *People v. Sanchez*, the guarantee of equal protection is not violated when illegal alien status is but one of several factors weighed and considered in denying probation. (*People v. Sanchez*, *supra*, 190 Cal.App.3d at p. 232.) Here, the juvenile court had before it a probation report which convinced it that the INS was going to deport Rogelio and therefore he would not be able to participate in the DEJ program. The report also listed additional factors unrelated to Rogelio's immigrant status which showed he was not suitable for DEJ. Nothing in the equal protection clause prohibits a juvenile court considering entry into a DEJ program from relying in part upon a probation report suggesting the defendant is very likely to be deported because of the offenses he has admitted. The record before us confirms that nothing more than that happened here.

II. Opportunity to Withdraw Admissions

Rogelio contends that if he was properly denied DEJ, we must nevertheless remand the case to the juvenile court in order to given him an opportunity to withdraw his admissions to the charges because he made them in exchange for placement in the DEJ program. The People concede such a remedy is warranted. We agree.

As the People note, unlike the statute governing negotiated guilty pleas (Pen. Code, § 1192.5), the statutes establishing the DEJ procedure for juvenile offenders do not require a court to inform the minor he has the right to withdraw his plea if the court finds him unsuitable for the program and do not specify at what point in the proceedings the minor must enter his admission to the charges. The statute suggests, however, that the preferred procedure is for the minor to formally admit the offenses *after* the court makes

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(1982) 457 U.S. 202, 226, is not controlling, since that case involved whether being subject to deportation was sufficient justification for denying a basic education to illegal alien children in general, not whether a court can determine if it is substantially likely an illegal alien child with no parent in this country who has admitted felony possession of cocaine will be deported.

a suitability determination: "If the minor consents and waives his or her right to a speedy jurisdictional hearing, the court may refer the case to the probation department or the court may summarily grant deferred entry of judgment if the minor admits the charges in the petition and waives time for the pronouncement of judgment…." (§ 791, subdivision (b); see also Judicial Council Forms, form JV-751 (form JV-751) [form for notifying a juvenile of the DEJ procedure states if the court and parties agree that DEJ "should be granted," the minor "will be required" to, inter alia, admit the minor committed the offense or offenses alleged to have been committed].)

In the present case, on November 25, 2003, form JV-751 was filed which stated Rogelio was eligible for consideration by the juvenile court for DEJ and provided notice that a hearing in which the court would consider whether to grant DEJ would be held on December 10, 2003. On December 23, 2003, Rogelio signed a waiver of rights in which the term "Deferred Entry of Judgment" was handwritten in three places. At a hearing that day, Rogelio admitted both allegations in the petition. Before the admissions, Rogelio's attorney stated "we're doing it under the deferred entry of judgment." After the admissions, the juvenile court stated "This is for deferred entry of judgment." When the court ultimately denied DEJ on January 12, 2004, it did not give Rogelio an opportunity to withdraw his admissions before adjudging him a ward of the court and imposing probation.

Rogelio argues the disposition violated his due process rights because he made his admissions in exchange for the DEJ program and the admissions were not made with the knowledge or intent that they be binding in the absence of being given DEJ. The People respond that there was never an agreement between the state and appellant as to the sentence, since under the DEJ procedure there is no offer from the prosecutor, only a determination that Rogelio was eligible for the program. Instead, the People argue this situation is more like an "indicated sentence" in which the juvenile court informed Rogelio of its intended disposition, contingent on a favorable report from the probation

department, and cite *People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909 for the proposition that when a defendant agrees to plead guilty based on a trial court's statement of intended sentence, the bargain does not require the concurrence of the district attorney. (*Id.* at pp. 914-915.)

Regardless of how the arrangement is characterized, the People acknowledge that Rogelio entered into a "sentence bargain" for DEJ that was not kept. (See *People v. Andreotti* (2001) 91 Cal.App.4th 1263, 1274 [stating that Penal Code section 1000.12, which provides for deferred entry of judgment for certain adult sexual offenders, "in effect amounts to a sentence bargain"].) We agree. Accordingly, consistent with principles of due process, Rogelio must be given an opportunity to withdraw his admissions to the drug offenses and his waiver of a right to a jurisdictional hearing so that he may contest the charges if he chooses. (See *Santobello v. New York* (1971) 404 U.S. 257, 263; *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861.)

DISPOSITION

The judgment is vacated and the matter is remanded to the juvenile court for the limited purpose of permitting Rogelio to make a motion to withdraw his plea. If the motion is not filed within 30 days after the remittitur is filed, or if the motion is denied, the judgment shall be reinstated.

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Gomes, J.

WE CONCUR:

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Levy, Acting P.J.

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Cornell, J.